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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 687

JOHN H. FAHEY and A. V. AMMANN, Individually and Respectively as FEDERAL HOME LOAN BANK COMMISSIONER and CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, G. H. NEWHOUSE, WINNIE BUCKINN, *et al.*,

Appellees.

Brief of the Attorney General of California, as Amicus Curiae, in Support of Appellees.

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Opinion Below.

The opinion of the District Court of the United States for the Southern District of California [R. 374-378] is reported in 68 Fed. Supp. 418.

Jurisdiction.

The judgment of the district court was ordered on September 30, 1946 [R. 490-500]. The petition for appeal was presented on October 2, 1946 [R. 506-507] and allowed on October 3, 1946 [R. 511-512]. The case was docketed in this Court on November 9, 1946. On December 9, 1946, this Court noted probable jurisdiction of the

case [R. 766]. The jurisdiction of this Court rests upon Sections 2 and 3 of the Act of August 24, 1937, Ch. 754, 50 Stat. 751, 28 U. S. C. 349a, 380a.

Questions Presented.

1. Whether Section 5, and particularly Section 5(d), of the Home Owners' Loan Act is invalid as transgressing Article 1, Section 1, and Article I, Section 8, Paragraph 18, of the Federal Constitution by reason of its failure to define reasonably definite standards and its invalid attempt to delegate legislative power.

2. Whether Section 5, and particularly Section 5(d), of the Home Owners' Loan Act is violative of the Fifth Amendment to the Federal Constitution by reason of its denial of due process of law.*

Prefatory Statement.

This brief is filed by the Attorney General of the State of California, as an *amicus curiae*, in support of the conclusions reached by the three judge statutory court which considered the issues herein and rendered judgment for the appellees. It is the considered opinion of this *amicus curiae* that the issues involved are impressed with such importance to the public interest as to warrant the filing of

*Additional questions are presented in the briefs of appellants and appellees, *viz.*: (a) whether the Association and its shareholders are estopped, (b) whether they were required to first exhaust the administrative remedies, (c) whether the defendant Fahey was an indispensable party and his presence was necessary to a determination of the constitutional questions, and (d) whether there was any error in the entering of final judgment by the district court.

These questions have been discussed in the briefs of the parties to the action and will be adverted to only incidentally by the *amicus curiae* herein.

a brief expressing doubt as to the constitutionality of the legislative measures employed by the agencies in question to implement the action taken, which action has occasioned confusion and alarm of such proportions as to indicate the need for judicial repudiation of the asserted powers and restraint of their exercise in this and other instances, until such time as such powers are validly invested.

We deem it neither helpful to constructive judicial consideration and correction of the serious abuses which have taken place, nor within the bounds of propriety, for us to join in the expression of amazement and resentment which has issued from individual minds as a result of what they consider to be an autocratic and vindictive course of action, one utterly foreign and repulsive to their basic concept of the principles upon which our democratic government rests. However revolting the course pursued with such disastrous effect, under the cloak of claimed legislative authorization, may be to the individual, our office is to address temperate and searching inquiry as to its validity. It is our belief that whether the practices employed involve an invalid assumption of non-existing powers claimed by those asserting them to flow from legislative enactment, or whether the legislation itself does purport, as claimed, to endow this agency with the powers exercised, the result is the same. We think that in either case the limits upon constitutional action have been transgressed.

What we *do* express, and seek to emphasize, is the widespread concern, the genuine alarm, occasioned by the situation resulting from the practices which have been engaged in, a situation deemed by us both unwholesome and men-

acing in its relation to public confidence, to sound public economy, and to the general weal.

We think it may not be gainsaid that considerations involving the savings and the homes of its citizens are the justifiable and cognizable concern of the state. That the maintaining of a sense of safety and security as to these things which so intimately affect domestic tranquillity and the general welfare is highly important to the well-being of the entire social and economic structure of the state, will not, we think, be challenged. Nor should recognition of the penetrating factor of extreme sensitivity which pervades the feeling of people, particularly those of moderate means, where the safety and protection of their savings and homes are at stake, be denied. Uncertainty and fear occasion doubt and confusion, which experience has demonstrated may lead to unrest and panic.

In addition to and apart from its regard for the well-being of those of its citizens who are investors and participants in institutions of Federal creation and control, the state has a very direct interest in the protection of those who have entrusted their earnings and their security to like institutions chartered and regulated under its own laws.

It has been held by this Court that legislation in this field lies within the province of the states and that the power of Congress is, at most, concurrent. (*Hopkins Federal Savings & Loan Association v. Cleary*, 296 U. S. 315.) In fact, in the *Hopkins* case, which involved the

meaning and validity of an Act of Congress whereby building and loan associations organized under the laws of a state might be converted into Federal Savings and Loan Associations, it was held:

> "The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the States. U. S. Constitution, Amendment 10." (296 U. S. at 335.)

It was further held that where by the challenged Act of Congress the associations were being dissolved in other ways and for other causes than those defined in the state statute which created and regulated the state associations:

> "In this there is an invasion of the soverignty or quasi sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment" (at p. 337).

In the *Hopkins* case the state was the suitor and this court held that it properly assumed that status. In the case here on appeal the state is not a suitor, nor has it essayed to become such. It does not seek to repulse "an assault upon the quasi public institutions that are the product and embodiment of its statutes and its policy," as there is no assault of such a nature here present. However, we think it neither far-fetched nor presumptive to express the view that there is here present "a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected." It is with this thought that this

amicus curiae, without asserting any claim of right for the state to bring suit in the premises, feels the responsibility of pointing out the dangers to which a sanction as to the constitutionality of the official acts engaged in would directly contribute.

While the legality of the merger of the Federal Home Loan Bank of Los Angeles, with assets of $43,000,000.00, with a Portland bank, and the immediately subsequent merger of both banks with a bank in San Francisco, is not a direct issue in this appeal, it is of cognate importance and significance—as it was made without notice or hearing of any character; none, in fact, being required by the statute under which this was attempted [R. 377; 68 Fed. Supp. 418, 420].

Illustrating the interest of the state which inevitably results from this act we submit the following data as to participation by State Chartered Associations in the Federal Home Loan Bank of Los Angeles as of March 29, 1946, the date of its seizure and merger:

> There were 74 Federal Savings and Loan Associations, owning 38,775 shares in the bank, of a value of $3,877,500.00. This constituted a percentage of 65% of the stock. The total assets owned were $386,601,769.00 and the total number of investors was 176,075.
>
> There were 88 State Chartered Associations, having 20,885 shares of a value of $2,088,500.00, constituting 35%. The total assets were $272,756,998.00 and the total number of investors 126,932.*

*The Savings and Loan Journal, Vol. XIX, No. 5; May 1946

It is thus obvious that numerous institutions of substantial proportions chartered by the state are intimately concerned in the administration of the Federal Home Loan Bank and that the state has a direct interest in the acts of the Federal Home Loan Bank administration by reason of the fact that these state chartered associations are shareholders therein and rely upon its facilities as a rediscount corporation for loans required to finance the construction of thousands of homes—this interest of the state being additional to that which it holds for sound and healthy public economies generally, which embraces the well being and safety of all those served by federal institutions and all who, in turn, cannot escape being affected by the over-all status of public confidence and trust.

That, without notice or hearing and within the compass of one day, the Federal Home Loan Bank of Los Angeles could be merged with that of Portland and the resulting bank then merged with a simultaneously created bank of San Francisco, and a new district set up, occasioned uncertainty and alarm does not excite our wonder.

That great confusion and consternation resulted from the seizure of the Long Beach Federal Savings and Loan Association (here directly concerned) by reason of the tangling and clouding of titles to thousands of homes excites no greater wonder.

These and other considerations set forth in the briefs of appellees, including the challenge by appellants of the jurisdiction of the United States District Courts as a forum within which the legal rights involved may be ascertained, have impelled us to question the validity of the acts which have precipitated the existing situation, regarded by us as seriously unwholesome and not free from dangerous consequence.

The Congressional Investigation.

It may be considered proper at this stage for reference to be made to the fact that on or about March 1, 1946, a complaint was made by the Federal Home Loan Bank of Los Angeles and the Federal Savings and Loan Association of Long Beach against the Federal Home Loan Bank Administration. This complaint was made to the "Select Committee to Investigate Executive Agencies" of the House of Representatives, Seventy-Ninth Congress, Second Session (pursuant to H. Res. 88).

As a result of this complaint hearings were conducted by the Committee, at which the testimony of twenty-three witnesses was taken (comprising 273 pages of printed record) and many exhibits were introduced.*

While it is not suggested that the evidence taken at these hearings fulfills the requirements of evidence in this case, many startling revelations resulted therefrom.

On July 25, 1946, the Committee filed its Report with the Committee of the Whole House on the State of the Union, and it was ordered printed.** The report sets forth an extensive review of the entire situation in respect of both (1) the purported mergers of the Los Angeles Bank with the Portland Bank and then of both with a newly created San Francisco Bank, together with the setting up of a new Federal Home Loan Bank district, all by orders issued on one day (March 29, 1946), and (2)

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*Hearings before the Special Committee to Investigate Executive Agencies, pursuant to H. Res. 88 (1946), Part 7.

**House Report No. 2689, 79th Congress, 2d Session (Union Calendar No. 819.)

This report is included in the Affidavit of Mallonee on file in the U. S. Supreme Court.

the action taken by the Commissioner in appointing a conservator and seizing the Long Beach Federal Savings and Loan Association on the morning of May 20, 1946.

At the close of its 28-page Report the Committee set forth its "Conclusion and its Recommendations." Included in its Recommendations are these: "That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of the two districts were intermingled," and "That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach, restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same . . . ." (The "Conclusion" and "Recommendations" are set forth below in their entirety.)*

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*Report of Select Committee to Investigate Executive Agencies. House Report No. 2659, 79th Congress, 2d Session. (Union Calendar No. 819) pp. 26-28.

CONCLUSION.

The action here complained of was not only a disservice to the Government but also a greater disservice to the people for the protection of whose rights and affairs our Government exists. Should the time come when our Government is incapable of discharging that fundamental function it must cease to exist in the form and for the purpose for which it was founded. The same end is inevitable for any endeavor with which the Government is identified. The necessity for unquestioned rectitude of purpose and sound, just and impartial administration of governmental endeavor is paramount.

The Federal Home Loan Bank System was created to meet a need which the Nation experienced. It is a potential factor in the era which lies ahead of us. The functions of this Government agency loom up as far more important in the future than it has ever been. Unless its administration is elevated to a higher esteem and

Bills to effectuate much of the remedial action recommended by the Committee have been introduced at the present (1st) session of the 80th Congress.

See *H. R. 1623*, by Cecil R. King (D. Cal.), to restore the Eleventh and Twelfth Home Loan Bank districts and to restore the Federal Home Loan Bank of Los Angeles and the Federal Home Loan Bank of Portland, and providing the manner in which districts may be hereafter changed.

H. R. 1697, by Cecil R. King (D. Cal.), to amend Section 5(d) of the Home Owners' Loan Act of 1933 to vest the power of appointment of conservators and receivers of Federal savings and loan associations in the United States District Courts and prescribing the grounds therefor.

See, also, *H. R. 200*.

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undergoes decided improvements, its efficiency will be seriously impaired.

RECOMMENDATIONS.

The recommendations of your committee are—

(1) That the Commisisoner revoke the order reducing the number of districts from 12 to 11 in the Federal Home Loan Bank System.

(2) That the Commissioner take all necessary steps to reestablish a Federal Home Loan Bank of Los Angeles and a Federal Home Loan Bank of Portland, and revoke the order or orders by which the assets of these two district banks were intermingled.

(3) Should the Commissioner, in the light of the evidence adduced before your committee, still adhere to the opinion that the number of districts should be reduced from 12 to 11, and is still of the opinion that he has the legal authority to reduce the number of districts, he should proceed to give due notice of such intention to all of the associations in the area affected, hold hearings, and give due weight to the recommendations of the officials of the banks involved and to the views of the associations which are members of the regional banks affected, and should likewise take

Summary of Argument.

I. Section 5, and particularly Section 5(d) of the Home Owners' Loan Act, is invalid for the reason that the limits of Article I, Section 1, and Article I, Section 8, paragraph 18, of the Constitution of the United States which require reasonably definite standards to be provided, where legislative powers are delegated by Congress, are transgressed. The specific provisions of Section 5(d) are definite and complete in and of themselves upon the subject of merger and liquidation, and are both isolated and insulated from the provisions of other subsections in the context.

II. Due process of law is denied, in violation of the Fifth Amendment, both by reason of the invalid delegation of legislative power and by the failure to provide valid notice and opportunity to be heard.

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into consideration the views of the industry generally. Any sudden and unheralded action, such as that taken in the case of the Los Angeles bank, is certain to have an unfavorable effect on the confidence of the public in the institutions involved.

(4) That the Commissioner revoke the order appointing a conservator for the Federal Savings and Loan Association of Long Beach and restore the assets and affairs of the association to its duly elected management, and render a proper accounting for the same, as expeditiously as is consistent with judicial determination of the questions at issue. Your committee questions whether the law ever contemplated that the Board should have the extraordinary power to seize and appoint a conservator for a solvent institution as a part of the supervisory functions entrusted to the Board over member banks.

(5) That the appropriate committees of Congress give consideration to the necessity (if, in the opinion of such committees, the necessity exists) of amending the Federal Home Loan Act in the following particulars:

(a) Clarifying the authority of the Board in the matter of approval of elective officers of the regional banks to the end that

ARGUMENT.

Introductory.

This *amicus curiae* is primarily interested in the causative factors which brought about the situation resulting in this litigation, for it is this situation and others like it which may occur that are menacing, in an appreciable degree, to the well-being of the people of the state. We address our discussion, accordingly, to the basic inquiry as to whether the practices which were here indulged find sanction in constitutional authorization.

However, we also are of opinion that the judgment of the district court was sound in its entirety, and that the contentions advanced by the appellants relating to questions other than the basic ones as to constitutionality of the Act are untenable. These questions are:

(1) Whether the association and its shareholders are estopped:

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neither the Board nor other officials may exercise such authority arbitrarily.

(*b*) Clarifying the authority of the Board or the Administrator to increase or decrease the number of regional banks, and specifying the condition and procedure under which such changes may be made.

(*c*) Prohibiting the agency from appointing conservators for any member association, except under specific and well-defined limitations.

(6). It developed in the hearings that the order relating to the appointment of a conservator for the Federal Savings and Loan Association of Long Beach had not been filed with the Federal Register, as required by law. The Division of the Federal Register advised your committee that only on three occasions has the Federal Home Loan Bank Administration complied with the requirement that its orders be filed with the Federal Register. Your committee further recommends that the Administrator comply with the law in this respect in the future.

(2) Whether they were required to exhaust administrative remedies before bringing this action;

(3) Whether the defendant Fahey was an indispensable party and his presence was necessary to a determination of the constitutional questions; and

(4) Whether there was any error in the entering of final judgment by the district court.

Each of these questions has been discussed extensively in the briefs of the parties, and it is not our purpose to reargue them here.

(1) It has been shown, as to the question of estoppel, that the fact of incorporation of the Long Beach Association under the Home Owners' Loan Act does not estop it or its shareholders to question the validity of Section 5(d). This is because the Act contains a *separability clause* (Section 9), and the provisions of Section 5(a) setting forth a complete plan for the "organization, incorporation, examination, operation and regulation" for such associations is clearly severable from those of Section 5(d) here in question. It has been pointed out that not only do the authorities hold that estoppel to challenge an unconstitutional provision does not apply to one who accepts the benefits of a statute where the statute contains a severability clause, but further, that it does not apply even in those cases where the statute itself does not contain such a clause,—if the provision is found to be severable.*

* See authorities cited pp. 13-15, Br. of Appellee Federal Home Loan Bank of Los Angeles.

(2) As for appellants' insistence that appellees should have demanded a hearing under Section 206.2 of the Rules and Regulations promulgated under the claimed authority of Section 5(d) of the Act before recourse to the courts was possible, the answer is that the source of the attempted provision for such a hearing was itself void, as determined by the court; and the issue presented by the suit brought was upon the constitutionality of that section of the Act—an issue purely of law. Under these circumstances, and particularly in view of the position of the appellees at the outset—which was one of direct challenge to the constitutionality of the section in question [R. 616, 625] it would have been an idle act to pursue the formalities of a hearing.

(3) The claim of appellants that the defendant Fahey was an indispensable party is refuted by their own disclaimer that he was not such in so far as the constitutional questions were involved [R. 675], as well as by authority.* The contention that Section 57 of the Judicial Code (28 U. S. C. 118) is inapplicable, upon the ground that the main gist of the action does not seek relief *in rem* but seeks *in personam* judgments, is also beside the point, inasmuch as the challenge here was to the existence of any authority whatever to perform the acts attempted. Moreover, it is irrefutable that the gist of the action was the return of the assets.

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*Acker v. Harwood (9 Cir.), 128 F. (2d) 846.

(4) The assertion of error by reason of the district court's entering a final judgment has been shown by the appellees to be not well grounded, for the basic fact upon which the entire case rests is the fact of the seizure,—and it is uncontroverted not only that the seizure was made, but that it was made under the claimed authority of Section 5(d). The question of the constitutionality of this purported authority was thoroughly presented,—and, the court having found it in contravention of the Constitution, all defenses incident to the seizure must needs have been fruitless. The stream cannot rise higher than its source.

While the foregoing subsidiary questions may serve as a sort of smokescreen somewhat obscuring the real target here, penetration to the basic question is not difficult. It is: "Do the provisions of the Act which is the source of the claimed authority for the practices engaged in overstep the bounds of Constitutional limitation?" We address our discussion to this question.

I.

Section 5(d) of the Home Owners' Loan Act Fails to Prescribe Reasonably Definite Standards and Constitutes an Invalid Attempt to Delegate Legislative Power.

Section 5(d) of the Home Owners' Loan Act Act (12 U. S. C., Section 1464(d)) provides as follows:

> "5(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

This is the provision in question. No further mention is to be found in the Act of the "reorganization, consolidation, merger or liquidation" here purported to be authorized.

The Constitution of the United States provides:

> Article I, Section 1. "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives."

Article 1, Section 8, contains an enumeration of the powers of Congress. The last paragraph of this section invests Congress with the following authority:

> "18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

While there has been divergence of opinion as to the application of these basic provisions to varying types of legislation, there appears to be general agreement with the statement of Mr. Chief Justice Hughes in *Panama Refining Co. v. Ryan*, 293 U. S. 388, at page 421:

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

After reviewing this Court's decisions upon this subject from *The Aurora v. United States* (1813), 7 Cranch 382, 3 L. Ed. 378, to the time of his statement, he concluded (at page 430) with:

> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."

The expressions employed in that decision have become well known. The necessity for Congress to "furnish a declaration of policy," to "set up a standard of action," to "outline the circumstances or conditions" under which action may be taken, has been plainly announced.

The difficulty in these cases is not so much in determining what Congress *may do*, but in ascertaining what it *has done*,—or attempted to do. It is thus that varying results occur in the application of the quite definitely established rule to different enactments.

The district court in this case subjected the Act in question to careful analysis and tested it by the established rules. It was unable to find in the Act any declaration

of policy or standard of action relating to the subject treated in Section 5(d), and as to that section it found:

> "It makes no attempt to lay down rules for the guidance of the board, nor does it state in what circumstances or under what conditions the board is to merge institutions or appoint a conservator or receiver. It establishes no criterion to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger or appointment of conservator. The section gives to the board unlimited authority to formulate rules for the board's action in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. *We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject of section 5(d).*" (Emphasis added.) [R. 377.]

Power was simply delegated to the Board to provide for reorganization, consolidation, merger or liquidation. The Board was given "full" power to make its own rules and regulations, and to appoint a conservator or a receiver. There are no limitations upon, nor conditions or circumstances requisite to, such action. The rules are not required to provide for notice or hearing. In short, not even a suggestion is made as to what provisions are to be embraced. And there is elsewhere in the entire Section 5 no reference whatsoever to the subject treated in subdivision (d). Subdivision (a) treats of the "organization, incorporation, examination, operation, and regulation" of such associations.

It is not suggested by us that Congress is under any compulsion to prescribe *detailed* rules. As was stated in the recent case, *American Power & Light Co. v. Securities and Exchange Commission*, 91 L. Ed. Adv. 89, at page 99:

> "Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency to apply it, and the boundaries of this delegated authority."

We think that these essentials have not been clearly delineated by Congress in this instance. It has instead presented the Board—here the individual commissioner—with something akin to a blank cheque and clothed him with authority to fill it in. The repository of power, *i. e.*, the Congress, is there, and all that is necessary is for the beneficiary to fill in the amount desired and the date. But the power to legislate reposes in the Congress,—and this may not be delegated except within constitutional limits.

These limits or boundaries require a designation by Congress of the circumstances under which an institution of its creation may be destroyed. They call for some enlightenment as to what character the rules and regulations for merger and liquidation may assume. Here we find none. It is as though Congress had said: "When it comes to the merger or liquidation of these associations you may choose your own reasons and have full power to proceed as you wish, without restraint or even admonition from us."

Certainly no claim will be made that in this Act are contained any such express restrictions as those found in *American Power & Light Company v. Securities and*

Exchange Commission, supra, where the Act (in the section itself in question) required the Commission to so act as "to ensure that the corporate structure or continued existence of any company in a particular holding company system does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute voting power among security holders.'" Such provisions were held of themselves to furnish *some* meaning in the *American Power & Light Company* case.

The language of this Court in that case: "But these standards need not be tested in isolation," is recognized as applicable in all cases. It was there held that these standards, implicit from express language of the Act, derive much meaningful content from other sources. The distinction in the instant case is that there is in Section 5(d) no expression of even general guideposts, from which a sense of direction or guarantee of safety may be gathered by reference to external sources. Congress, whether by inadvertence or design—it matters not which—has given the green light for the commissioner to proceed upon a course of his own selection.

We think it not enough to say that the commissioner, who is endowed by Congress with "full" power, may wander at will for suggestion or support for the rules and the courses of action he chooses to prescribe and follow. Appellants turn from the Act and seek to find remedy for the statutory omission in dictionary definitions of words, in "the large body of judicial doctrine," and in various state statutes and rules. While there may be virtue to be found in these things, there exists also much of variance and confusion. The picking and choosing is left to the commissioner. Had Congress had in mind those definitions, those settled decisions regarded as free from un-

certainty, and those selected statutes and rules of states (out of the many) which it was ready to accept as the best established criteria, it would seem reasonable to believe that it would have so indicated. Instead, it endowed the commissioner with "full" power to make his own rules and to exercise his unfettered discretion in performing acts amounting to little less than the destruction of solvent, prosperous institutions.

After reaching out in an attempt to find external aids for the furnishing of implied standards appellants return to the Act, with the claim that they are to be found within its corners (Br. 72). After enunciating subsections (a) to (k) of Section 5 they place their main reliance for this claim upon subsections (a) and (e). In the former, which relates to the organization, incorporation, examination and regulation of the association, it is said that "primary consideration is to be given to the best practices of local mutual thrift and home-financing institutions in the United States." (In subsection (e) it is provided that no charter is to be granted unless there is reasonable probability of its usefulness and success, unless it can be established without undue injury to properly conducted existing institutions. While these subsections may be regarded as expressing laudable purpose and indicating considerations to be minded of in the formation of associations, it is significant to note that *each* specifically relates to the *creation* of the association. Had Congress chosen to impose these conditions or qualifications upon the exercise of the crushing power to merge or to liquidate it would have been a simple matter to have included the terms "reorganization, consolidation, merger or liquidation," as to which unfettered power is conferred in Section 5(d).

in the enumeration of the terms "organization, incorporation, examination, operation and regulation" employed in Section 5(a), to which latter section the application of Section 5(e) is, by its own terms, specifically limited. This Congress did not do. Its intent and the effect of its express provision in Section 5(d) are thereby definitely established. It requires no attenuated refinement of statutory construction to compel this inescapable result. It set up an entirely separate and unrestrained investiture of power in Section 5(d),—one clearly both isolated and insulated from the conditions imposed upon the exercise of the other confered powers. That this was ill-advised, unwise and potentially disastrous is not the question. It was violative of the restraint imposed by the Constitution.

On pages 82 and 83 of their brief appellants cite a number of decisions in which certain phrases employed in the implementing portions of statutes have been held to furnish sufficient standards or guides to afford escape from their being denounced as guilty of an unconstitutional delegation of legislative power. They make no mention in this connection of the recent case of *American Power & Light Company v. Securities and Exchange Commission*, *supra* (Nov. 25, 1946), where adequate standards were found to exist. There the subsection *itself* which was under attack specifically provided that the Commission should act so as "to ensure that the corporate structure or continued existence of any company in a particular holding company system does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute

voting power among security holders.'" While in each of the cases cited by appellants there were phrases employed with reference to the power confined which were held to furnish a standard of action for its exercise, here appellants point to nothing save one word,—that of "conservator." Contrast with this the significant fact of which has been brought to this Court's attention that the *Bank Conservation Act*, 12 U. S. C., Sec. 203, makes specific provision for the appointment of a conservator "whenever the Comptroller shall deem it necesary to conserve the assets of any national bank for the benefit of its depositors and other creditors."

So, likewise, the *Banking Act of 1933*, 12 U. S. C., Sec. 71a, authorizes the Comptroller to appoint a conservator "whenever any national bank or Federal Reserve member bank violates the requirement that such institutions have from five to twenty-five directors." The *National Housing Act*, 12 U. S. C., Sec. 1729, empowers the Federal Savings and Loan Insurance Corporation to act as *conservator* or *receiver* whenever any savings and loan association shall be in default. And the *National Banking Act*, 12 U. S. C., Sec. 191, authorizes the appointment of a receiver whenever

(a) a national bank shall be dissolved or its charter forfeited,

(b) a judgment against it shall be unsatisfied for thirty days, or

(c) the Comptroller becomes satisfied of its insolvency.

These Acts all furnish illustrations of fair and reasonable guides for administrative action. The words "conservator" and "receiver" are employed there, as they are in Section 5(d),—but the authorization or delegation is not rested upon the employment of a naked word. Section 5(d) is barren of any standard of action.

In this *amicus curiae* brief we have refrained from extensive citation of authorities. The cases on the subject of delegation of power may be said to be legion. The three judge statutory court below bottomed its decision upon two outstanding landmarks in which the basic principles are clearly enunciated.

Panama Refining Co. v. Ryan, 293 U. S. 388;

Schechter Poultry Corp. v. U. S., 295 U. S. 495.

In the first of these two cases Mr. Chief Justice Hughes traced the development of decision in this field from *The Aurora v. U. S., supra* (1813), down to the date of the opinion in the "hot oil" case. In the second he reaffirmed what had been written into the *Panama Refining Co.* case. "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." Mr. Justice Cardozo in his concurring opinion described the delegated power in that case as "unconfined and vagrant."

To the decisions cited by the three judge court below as supporting its judgment in this case might be added:

Carter v. Carter Coal Co., 298 U. S. 238;

Morgan v. U. S., 304 U. S. 1;

Butler v. U. S., 297 U. S. 1;

Ohio Valley Water Co. v. Ben Avon Burrough, 253 U. S. 287;

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48;

Coe v. Armour Fertilizer Works, 237 U. S. 413,

and numerous others.

In the briefs filed by the appellees are collected and collated many decisions of importance and assistance on this question. No need appears for a duplication of those here.

The problem always has been and it is likely that it will continue to be one of examining critically each venture into the field of legislative experimentation with a purpose to discover whether, if sanctioned, its effect upon our basic charter would be a corrosive one.

We cannot escape the conviction that in this case there has been an attempt at unrestrained delegation, one fraught with dangers which eventualities have demonstrated are far from fanciful.

This Court, while recognizing that Congress is not denied "the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and making standards," has held:

> "But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.*" (Emphasis added.)

Panama Refining Co. v. Ryan, supra, at p. 421.

II.

Section 5, and Particularly Section 5(d) of the Home Owners' Loan Act Is Violative of the Fifth Amendment to the Federal Constitution by Reason of Its Denial of Due Process of Law.

The Fifth Amendment to the Constitution of the United States provides (Section 1) that no person shall be deprived of his life, liberty or property without due process of law.

While the unlawful delegation of legislative power discussed under Point I herein constitutes a violation of this Amendment, as well as of Article I, Section 1, and Article I, Section 8, paragraph 18, these are additional respects in which due process is here denied.

Mr. Justice Field, in the case of *Pennoyer v. Neff*, 95 U. S. 714, 733, defines "due process of law" to

> "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is by the law of its creation—to pass upon the subject matter of the suit."

One of the rights vouchsafed by the due process guarantee is that of an opportunity to be heard. This has been characterized as a "rudimentary requirement of fair play." In *Morgan v. U. S.*, 304 U. S. 158, which involved the validity of an order of the Secretary of Agriculture fixing rates to be charged by stockyards, in which the

validity of the Act of Congress was also involved, this Court had the following to say:

> "On this appeal, plaintiffs again contend (1) that the secretary's order was made without the hearing required by the statute, and (2) that the order was arbitrary and unsupported by substantial evidence.
>
> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administration regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle that *the legislature* shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as 'inexorable safeguard.' St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720; Ohio Bell Telephone Co. v. Public Ut. Comm., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724; Railroad Commission v. Pac. Gas and Electric Co., 302 U. S. 388, 393, *ante*, 319, 58 S. Ct. 334; Morgan v. U. S., 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.'"

Let us inquire as to what, if any, provision is made in the Home Owners' Loan Act for a hearing. The statement is made in appellants' brief (p. 88) that "Section 5(d) clearly authorizes the Bank Administration to provide in its rules and regulations for a hearing.". The fact is that Section 5(d) is totally devoid of even mention of a hearing. If appellants' meaning is that the Board was given a blanket order, without suggestion as to anything whatever which was to be incorporated in the rules and regulations which it was given "full power" to adopt, the statement may be taken as a correct one. But the language of Section 5(d) is totally silent on this subject, as is that of the other sections.

However, appellants point to Section 206.2 of the Rules and Regulations promulgated by the Commissioner for Federal Savings and Loan Associations (8 Federal Register 1180) as affording valid provision for notice and hearing. This rule provides that the *Federal Association* (with no opportunity being accorded for notice to or hearing of the shareholders) may within fourteen days after the appointment of a conservator file an answer and serve a written demand for a hearing, whereupon the Administration will issue and serve a notice of hearing.

But if, as we believe has been demonstrated, Section 5(d) of the Act falls as violative of the limits upon legislative delegation this rule becomes one totally lacking in authority or validity. The hearing, if such there be, becomes one not of right but of mere grace or favor. Such a formality is no hearing at all. A total failure of due process results.

'The authorities are clear on this point. In *Coe v. Armour Fertilizer Works*, 273 U. S. 413, this Court held:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 523, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but *the question is whether any notice is provided for by the statute*' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, 52 L. Ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: *'This notice must be provided as an essential part of the statutory pro-*

vision, and not awarded as a mere matter of favor or grace.' In Roller v. Holly, 176 U. S. 398, 409, 44 L. Ed. 320, 524, 20 Sup. Ct. Rep. 410, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.'"

See, also:

Wutcher v. Pizzutti, 276 U. S. 13.

Appellants (Br. 88) assert that the "appellees," in which the individual shareholders are necessarily included, "are not adversely affected by any omission in the statute to direct a hearing," and cite *American Power & Light Co. v. Securities and Exchange Commission, supra.* We do not so understand that decision. Under express provision of the *Act* (Sec. 11(b)(2)) the managements of the corporations "admittedly were notified and participated in the hearings as required by Section 11(b)(2); and they possess no standing to assert the invalidity of that section from the viewpoint of the security holders' constitutional rights to notice and hearing." By specific provision of Section 19 of the *Act* the Commission was authorized to admit, in accordance with rules and regulations prescribed by it, "any representative of interested consumers or investors, or any other appropriate person, as a party to any proceeding before that body," and all security holders received notice of the pendency of the proceedings and invitations to file applications for intervention.

Appellants' citation (Br. 89) of *Yakus v. United States*, 321 U. S. 414, 436, 442, in support of their statement that where the right to a hearing accrues only after the appointment of the conservator appellees are not deprived of due process also requires clarification. That case

involved the Emergency Price Control Act. The decision is clearly predicated upon considerations involving "the urgency and exigencies of war-time price regulation" (p. 435). Its statement is that "when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity" (p. 442). Congress, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war was permitted to do this "as the guardian of the public interest of the nation in time of war" (pp. 41-42). Thus qualified and restricted the decision does not afford appellants the support claimed from it.

It is suggested that further instances of denial of due process result from the bias and prejudice evidenced in the record on the part of the commissioner [R. 104, 105], and from the merger which was effectuated without notice or hearing of any kind [R. 377]. These matters are developed in the briefs of the appellees.

For the reasons herein given, it is respectfully submitted that the judgment appealed from should be affirmed.

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